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No. 07-654

In The

Supreme Court of the United States

KENNETH JONES,

Petitioner,

v.

ADAM JENNINGS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, THE RHODE ISLAND LEAGUE OF CITIES AND TOWNS, IN SUPPORT OF PETITIONER

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MOTION OF THE RHODE ISLAND LEAGUE OF CITIES AND TOWNS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

Pursuant to Rule 37 of the rules of this Court, the Rhode Island League of Cities and Towns (hereinafter "League") respectfully requests leave to file the accompanying brief as an Amicus Curiae in support of the Petition of Writ for Certiorari in the above referenced case.[1] The League is an Association representing thirty-seven of the thirty-nine cities and towns in Rhode Island. It advocates on behalf of local municipalities for executive and administrative agencies and before the State legislature.

There is good cause for this Court to grant this motion. As set forth in the Introduction and Interest of Amicus Curiae in the attached Brief, the League acts as an advocate for local law enforcement departments. In this matter, the League represents the collective concern of those Departments regarding the issues addressed in the Amicus Curiae Brief.

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[1] Petitioner consented to the filing of the attached brief, but respondent did not.

For these reasons, the Rhode Island League of Cities and Towns respectfully moves for leave to file the attached Brief as Amicus Curiae.

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals follow the correct standard in determining that the "clearly established" prong of a qualified immunity analysis is met by obviousness when one similar holding exists in an outside jurisdiction?

2. Upon the conclusion of evidence on a renewed Rule 50 motion, must the Trial Court rely, in every circumstance, on the jury for a determination of contested facts necessary for a qualified immunity analysis?

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INTRODUCTION AND INTERESTS OF AMICUS CURIAE

The Rhode Island League of Cities and Towns, since its inception in 1968, has been widely recognized as the unified voice of local government in Rhode Island.[1] The League currently enjoys a membership that includes thirty-seven (37) of Rhode Island's thirty-nine (39) cities and towns.

Associations like the Rhode Island League of Cities and Towns (hereinafter "League") exist in forty-nine states. They were originally formed for the purpose of representing municipal government interests before state legislatures. This role has expanded to include representing municipalities before executive and administrative agencies; advocating on behalf of local municipal departments, including law enforcement, public works and planning/zoning; appearing before the courts as amicus on various municipal issues; and providing technical assistance, information sharing and training to assist municipal officials in fulfilling their responsibilities.

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[1] The parties were notified ten days prior to the due date of the brief of the intention to file. Respondent has not consented to the filing of this brief, so in accordance with Rule 37(2)(b) a motion prepared as one document with this brief is filed herewith. In accordance with Rule 37.6, amicus state that no counsel for any party has authored this brief in whole or in part. Amicus also states that the Rhode Island Interlocal Trust is responsible for the attorney fees of Marc DeSisto.

The strength and effectiveness of the League is derived from uniting its member municipalities and merging their divergent opinions and needs into a cohesive expression of municipal views, interests and initiatives. It follows naturally, then, that the League members have come together today, and are united, in their position that local law enforcement departments are in desperate need of a clear and unambiguous standard against which to measure proscribed police officer conduct. Municipalities in Rhode Island, and across the nation, have a vital interest in local law enforcement training, and, in that spirit, the League strongly urges the Court to grant certiorari in this case.

STATEMENT OF THE CASE

During his participation in the execution of a search warrant, Rhode Island State Police Trooper, Kenneth Bell arrested Adam Jennings. (R552). Jennings resisted the arrest and during the course of the brief but violent struggle, his ankle was broken. (R338-339). Jennings brought suit, along with others, alleging in part, excessive force in violation of his Fourth Amendment Constitutional Rights.[2]

[2] The suit emanated from a struggle between the Rhode Island State Police and members of the Narragansett Indian Tribe when officers attempted to serve the search warrant to confiscate cigarettes being sold by the Tribe without compliance

(Continued on following page)

The District Court allowed the jury to decide the excessive force claim after denying the motion for Judgment as a Matter of Law (JMOL) made by Trooper Jones on qualified immunity grounds. The jury returned a verdict for Jennings. (App. 104-105).

On a renewed Rule 50 motion made post-verdict, the Trial Court determined that it was a mistake not to grant the original Motion for Judgment because, upon reflection and notwithstanding the general jury verdict, the plaintiff had failed to provide any evidence of excessive force. (App. 79-80). The Trial Court also found that the actions of Trooper Jones were not a "clearly established" constitutional violation. (App. 85-86).

The First Circuit Court of Appeals reversed the Trial Court's grant of the JMOL motion and reinstated the verdict. A divided Court of Appeals found that the general jury verdict in favor of Jennings compelled a finding that excessive force was proved for the qualified immunity analysis. (App. 21, 43, 101). The majority also determined that the Trooper's conduct was a "clearly established" violation of the Fourth Amendment because one case, *Smith v. Mattox*, 127 F.3d 1416 (11th Cir. 1997), confirmed the obviousness of this fact. (App. 32-34).

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with Rhode Island sales tax laws. Two other individuals filed suit along with Mr. Jennings against eight defendants for a variety of claims.

SUMMARY OF ARGUMENT

Amicus advocates for Certiorari to be granted so this Court can address and clarify two issues relating to the qualified immunity analysis. First, fundamental fairness requires fair warning to law enforcement officers before they loose the protections afforded them under qualified immunity. The decision of the First Circuit Court of Appeals in the instant matter creates an unreasonable standard for determining if proscribed conduct is "clearly established." The Court of Appeals determined that one similar case, in another jurisdiction, demonstrated the obviousness of the proscribed conduct. This determination places an unfair burden on law enforcement to be aware of, and conform to, any single holding on similar facts in any jurisdiction.

Amicus urges this Court to clarify the standard for determining when the "clearly established" prong of the qualified immunity analysis is met. Proscribed conduct, for purposes of qualified immunity, should be found to be "clearly established" when there is a case on point in the home jurisdiction, or a consensus of cases nationwide or when it should be obvious to any reasonable person, without reference to decisional law, that the conduct is wrong.

The second issue upon which Certiorari should be granted concerns the manner in which a Trial Court should determine facts necessary for a qualified immunity analysis. Amicus urges this Court to hold that in proper circumstances, the Trial Court is free

to make findings of disputed facts necessary for a qualified immunity analysis without reliance on the jury. In a number of cases, including this one, the First Circuit Court of Appeals has sought guidance from this Court on whether reliance must be placed on a jury's general verdict when making post trial decisions on qualified immunity. In the instant case, the Court of Appeals relied on the general verdict in finding that excessive force was established at trial. Conversely, the Trial Court, found, notwithstanding the general verdict, that the plaintiff did not prove excessive force. Amicus urges this Court to grant Certiorari to settle this conflict.

I. THE FIRST CIRCUIT COURT OF APPEALS MISAPPLIED THE STANDARD ON THE "CLEARLY ESTABLISHED" PRONG OF THE QUALIFIED IMMUNITY ANALYSIS WHEN IT DETERMINED THAT THE CONDUCT OF THE OFFICER WAS "CLEARLY ESTABLISHED" BECAUSE THERE WAS A SIMILAR HOLDING IN ONE CASE IN AN OUTSIDE JURISDICTION

There is a great need for a consistent standard to be applied on the "clearly established" prong of the qualified immunity analysis. Municipalities in Rhode Island and across the nation have at least a two-fold interest in sufficiently training local law enforcement departments. First, appropriate training promotes the safety and welfare of citizens and officers alike. Second, municipalities are subject to civil damages

for the conduct of poorly trained officers who violate individuals' constitutional rights. *City of St. Louis v. Propratnick*, 45 U.S. 112 (1988). Consequently, it is important to municipalities that this Court re-establish its well defined criteria for analyzing the "clearly established" standard so that a consistent approach to training can be implemented.

Simply put, Amicus urges this Court to grant certiorari in this case to answer the question of when proscribed conduct is "clearly established" such that it gives fair warning to law enforcement officers and their municipal employers who train them. In the context of this case, this Court should determine whether an ordinarily prudent officer, and his or her municipal employer, are charged with the obligation of scouring the judicial annals on a national level, and to such a degree, that in any circumstance the officer will know what is acceptable professional behavior.

The First Circuit's decision in the instant case mandates this heavy burden. Amicus asks this Court to review this case to re-establish a more reasonable approach.

In past decisions, this Court has had little difficulty in outlining specific criteria for a consistent application. In *Wilson v. Layne*, 526 U.S. 603, 617 (1999), this Court determined that the law on third party entry into homes (accompanying police officers executing a valid warrant) was not clearly established when that conduct occurred in April of 1992.

The decision was based on the lack of definitive case law in two separate categories. First, the petitioners could not cite to "any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rules on which they seek to rely." *Id.* at 617. Second, the Court noted a lack of "a consensus of cases of persuasive authority such that a reasonable officer could not have believed his actions were lawful." *Id.*

Consequently, the *Wilson* decision guided law enforcement agencies that a case in their own jurisdiction or, alternatively, a number of consistent opinions outside of the jurisdiction, would serve as fair warning. Later, this clear and reasonable approach was expanded in two important respects. This Court formally acknowledged an "obvious" category, such that an officer was expected to know without any case law that certain conduct violated the Constitution. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). Next, this Court defined the meaning of "clearly established" in a "more particularized and hence more relevant" sense, laying to rest any argument that general principles of constitutional law served as fair warning. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). Instead, the inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 198 (2001).

Until the instant First Circuit decision, it was reasonable for law enforcement to proceed under the premise that challenged conduct reviewed in a

particularized way would cross the "clearly established" line only if it:

1. Obviously violated the Constitution; or

2. A case or cases existed in the jurisdiction demonstrating its constitutional infirmity; or

3. Although there was no case in the jurisdiction, a consensus of cases, nationally, existed such to serve as fair warning.

Amicus strongly urges this Court to confirm this consistent analysis and override the First Circuit's departure from this approach. Officer Jones's conduct was not "clearly established" to be wrong when analyzed within the consistent analysis and framework discussed above. Yet, the First Circuit determined otherwise. Finding no similar case in its jurisdiction, and, a lack of a consensus of cases, elsewhere, the majority opinion relied on one case in the Eleventh Circuit, *Smith v. Mattox*, 127 F.3d 1416 (11th Cir. 1997), to demonstrate the obvious constitutional violation of the trooper's conduct:

> "Although *Smith* helps to demonstrate that the law protecting Jennings from Jones's increased use of force was "clearly established" our conclusion does not depend on this strikingly similar case. Instead, *Smith* emphasizes the obvious unconstitutionality of increasing the force used on an arrestee to such a degree that a broken ankle results, after the arrestee has ceased resisting for several seconds and stated that the force

> already used is hurting his previously injured ankle." (App. 32-33).

In effect, the majority opinion seems to have created an overriding standard that establishes proscribed conduct if even one case exists in an outside jurisdiction. This determination, if it is allowed to stand, sets aside any analysis as to whether there is a case on point in the officer's home jurisdiction or a consensus of cases, nationally. Instead, the First Circuit favors a presumption of "obviousness" so long as one case is on point in a remote jurisdiction.

The Court of Appeals holding is demonstrably flawed when viewed in context with the evidence at trial. The only expert to testify on the issue of proper police methods was a training officer for the State Police Academy, adopted as the plaintiff's own expert who, as the Trial Court summarized, testified "that Jones acted properly in continuing to apply the ankle turn control technique until Jones [sic] was fully under control and in custody and that Jones's use of force was reasonable under the circumstances." (App. 85). The First Circuit's reliance on a similar case in another jurisdiction to determine obviousness seems to be at the deliberate exclusion of this expert's testimony. It is the seemingly heavy reliance placed on this one case that is most troublesome. The dissent highlights the problem:

> "Indeed, the majority goes so far as to reason that it should have been perfectly obvious to Jones that his use of force was excessive, despite the fact that the only expert testimony

> was directly to the contrary and the District Court which heard the evidence concluded otherwise." (App. 56).

The First Circuit's misplaced reliance on one "outside jurisdiction" case demonstrates the need for this Court to re-establish the standard for this prong of the qualified immunity analysis. In addition, the finding of obviousness based on one case in another jurisdiction will have an effect on the final determination of whether the officer reasonably should have known that the conduct was violative of the Constitution. It is far easier to meet this element once there is a finding that the conduct at issue "obviously" was wrong.

As a final note, Amicius submits that it is important for this Court to clear up any ambiguity in this prong of the qualified immunity analysis. It is this prong, whether conduct is clearly established as constitutionally infirm, that may be the initial and decisive determination or, at least the most prominent determination, if the "order of battle" sequence is overruled. *Saucier*, 533 U.S. at 201 (Breyer, J., concurring). Amicus urges this Court to adopt the reasoning of Justice Breyer in support of abandoning the necessity of first finding a constitutional violation in the qualified immunity analysis before proceeding to the second prong of whether that violation is "clearly established." *Morse v. Frederick*, 550 U.S.

___, 127 S. Ct. 2618, 2641 (2007) (Breyer, J., concurring in part, dissenting in part).[3]

A shift in the analysis, when there exists difficult constitutional issues, will make the "clearly established" element more prominent. All citizens will benefit if this Court grants this petition, and re-establishes a consistent framework upon which to decide this, ever increasing, important determination.

II. THE TRIAL COURT SHOULD HAVE DISCRETION IN APPROPRIATE CIRCUMSTANCES, TO DETERMINE CONTESTED FACTS NECESSARY FOR A QUALIFIED IMMUNITY ANALYSIS NOTWITHSTANDING A GENERAL JURY VERDICT

Amicus urges this Court to grant the petition and decide that under proper circumstances, the Trial Court, without reliance on the jury, has the discretion to make findings of fact necessary to determine the issue of qualified immunity. In the instant case, the Trial Court, in addressing the qualified immunity issue, post-verdict, made findings of fact independent of the jury verdict. Specifically, the Trial Judge utilized a general standard that on a Motion for Judgment raising the qualified immunity defense, and

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[3] Amicus notes that the Court granted certiorari on the qualified immunity issue, but, it was not addressed in the majority opinion. The Appellate Court's holding was reversed on a different ground.

decided after trial, "deference should be accorded to the jury's discernable resolution of disputed factual issues." (App. 74).

However, the Trial Court determined that the plaintiff failed to present any evidence on whether the Trooper's action deviated from the standard of conduct expected of an objectively reasonable officer under the circumstances. (App. 85). Consequently, the Trial Court found that the plaintiff did not prove the Fourth Amendment constitutional violation of excessive force. (App. 86).

Conversely, the First Circuit found that the plaintiff did present evidence that could be construed as excessive force. (App. 17). The Appeal's Court noted "that a reasonable jury could have found that Jones increased the force he used after Jennings had already ceased resisting [is] based on the principle that we must view the evidence in the light most favorable to the jury verdict." (App. 13). The First Circuit noted the conflict in its factual analysis, with the lower Court's reasoning, which resulted in the opposite findings of fact, on the critical element of whether excessive force was established by the evidence. (App. 13).

Both the majority opinion and the dissent referenced the need for clarity from this Court as to whether a Trial Judge may act as a fact finder when there is a factual dispute underlying a qualified immunity analysis.

The majority opinion stated,

> "The dissent intimates that the jury's fact finding role may be different in a case involving qualified immunity, noting our prior statement that 'the Supreme Court has not clearly indicated whether the Judge may act as fact-finder when there is a factual dispute underlying the qualified immunity defense or whether this function must be fulfilled by a jury.'" (App. 15).

Similarly, the dissent stated,

> "The Supreme Court has not yet addressed the question of what role jury findings play in the judicial immunity determination, nor has this Circuit. *See, e.g., Kelley v. LaForce*, 288 F.3d 1, 7 n.2 (1st Cir. 2002) ("[T]he Supreme Court has not clearly indicated whether the Judge may act as fact finder when there is a factual dispute underlying the qualified immunity defense or whether this function must be fulfilled by a jury"); *Ringuete v. City of Fall River*, 146 F.3d 1, 6 (1st Cir. 1998) ("Something of a 'black hole' exists in the law as to how to resolve factual disputes pertaining to qualified immunity when they cannot be resolved on summary judgment prior to trial"). No clear answer has emerged from the Circuits."

(App. 46).

The First Circuit Court of Appeals opinion should be reversed because, in determining the facts, it rejected the Trial Court's determination of the lack of

any evidence of excessive force and instead relied on the jury's general determination of liability. Amicus submits that a more reasonable approach is to allow the Trial Court to have the discretion to make factual determinations in appropriate cases, such as, when the Court determines there is an absence of any credible evidence on a necessary element of a constitutional violation.

By necessity, factual findings, in limited areas, exist in jury trials. Courts routinely engage in fact finding assessments in both criminal and civil matters. For instance, Trial Courts are frequently called upon to decide facts in addressing motions to suppress evidence or inculpatory statements in criminal matters. Similarly, Trial Courts must make factual determinations in civil matters relating to a number of affirmative defenses, such as, statute of limitations or laches (i.e., whether a plaintiff knew, or should have known, when a particular cause of action began to accrue).

Submitting disputed facts to the jury in the above stated circumstances are clearly impracticable. In the usual accepted practice, the Trial Court presides over a hearing and makes factual and legal determinations which impact whether, and under what circumstances, a trial proceeds to a jury verdict. A preliminary finding, either pre- or post-verdict, that the elements of qualified immunity have, or have not, been met should be treated in the same manner.

In the instant case, the Trial Judge who heard all of the evidence determined that the plaintiff failed to prove excessive force. The First Circuit allowed the jury's verdict to overshadow the analysis of the Trial Court in this important respect. The Appeals' Court should have determined the propriety of the lower Court's ruling based on an abuse of discretion standard without regard to its interpretation of the jury's general verdict.

Moreover, it is not without precedent for Appellate courts to make findings of fact from the record when necessary. Recently, this Court made reference to a videotape introduced in evidence to determine that there was no genuine issue of material fact in a summary judgment motion involving qualified immunity, despite the Appellate Court's decision to the contrary. *Scott v. Harris*, 550 U.S. ___, 167 L.Ed. 2d 686 (2007). In *Scott,* the Eleventh Circuit Court of Appeals adopted the plaintiff's version of the facts in affirming the denial of summary judgment on qualified immunity grounds. *Id.* at 691. The Eleventh Circuit followed the general rule that upon a motion for summary judgment, when there are differing versions, the Court is required to view the facts in the light most favorable to the non-moving party. However, on appeal to this Court, the plaintiff's version of the facts was rejected because it was at odds with a videotape depicting the incident, which was directly contrary to the plaintiff's version, and not otherwise determined to be inaccurate. This Court stated:

> "When opposing parties tell different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a Court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. That was the case here with regard to the factual issue of whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; and should have viewed the facts in the light depicted by the videotape." *Scott,* 127 S. Ct. at 1779.

In making this assessment, this Court employed a similar analysis as the Trial Court in the instant case, when it found that the credible evidence did not demonstrate the finding of a constitutional violation. In spite of the jury's verdict, in the instant matter, the Trial Judge concluded that there was no evidence on the record to substantiate a claim of excessive force. Coincidently, the Trial Judge also relied, in part, on his interpretation of what was depicted on a videotape introduced as an exhibit.

Amicus submits that in this ever increasing technological age, recorded events placed before the Judge and jury will be the norm in trial proceedings.

Under these circumstances, Trial Courts should be free to decide facts despite a general jury verdict on issues of qualified immunity.[4] If the touchstone set forth by this Court in *Scott* and referenced above is to remain, this Court must address the First Circuit's ruling which takes such "visible fiction" and cements it into a reality. A proper rule would allow the Trial Court the discretion, on a case by case basis, to decide factual disputes in a qualified immunity analysis, subject to appellate scrutiny for an abuse of that discretion. Amicus respectfully asks this Court to grant certiorari to clarify this issue.

III. CONCLUSION

Granting certiorari in this matter will allow this Court to address and clarify the standards to be applied in a qualified immunity analysis. A decision in this regard will allow for a more consistent

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[4] There is additional precedent for Trial Courts to make findings of fact on contentious issues. Amicus notes that in *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985), this Court accepted a District Court's determination after a hearing (without regard to a jury decision) on a key fact issue on a qualified immunity determination. "The District Court held a hearing on the purpose of the wire tap and took Mitchell at his word that the wire tap was a national security interception, not a prosecutorial function for which absolute immunity was recognized." *Id.*

application to qualified immunity. Amicus respectfully requests this Court to grant certiorari.

Respectfully submitted,

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